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Case Notes

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CASE NOTES

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Edited by
Allen J. Ginsburg

Federal Registration Statutes Held To Violate The Fifth Amendment—*Marchetti v. United States*, 88 S. Ct. 697 (1968); *Grosso v. United States*, 88 S. Ct. 709 (1968); *Haynes v. United States*, 88 S. Ct. 722 (1968). In three recent opinions, the Supreme Court held that the self-incrimination privilege provided a complete defense to federal prosecutions. In *Marchetti* and *Grosso* the defense was held proper against violations of federal tax statutes requiring gamblers to register and pay excise and occupational taxes. In *Haynes*, the defense was held proper against a prosecution for failure to register firearms under Section 5841 of the Internal Revenue Code. The two former cases specifically overruled previous Supreme Court decisions on the subject; *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1954).

In the *Marchetti* and *Grosso* cases, the specific provisions in issue were part of a statutory tax on wagers. Sections 4401 and 4411 imposed excise and occupational taxes. In particular, Section 4412 required that those liable for the occupational tax register each year with the director of the local revenue district. The registrant must give "resident business addresses and must indicate whether they are engaged in the business of accepting wagers, and must list the names of their agents and employees". In addition, registrants were obliged to post revenue stamps, denoting payment, "conspicuously" in their places of business or on their persons. Finally, they are required to preserve daily records of the wagers made, which are open to inspection. Section 4422 declares that the payment of the wagering taxes is not to "exempt any person from any penalty provided by a law of the United States or of any state".

The issue was whether the methods employed, as shown above, were "consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment".

The Supreme Court said that they were not. Wagering and its ancillary activities are widely prohibited under both federal and state laws. "Evidence of the possession of a federal wagering tax stamp, or of payment of the wagering taxes, has often been admitted at trial in state and federal prosecutions for gambling offenses. Under these circumstances, the Supreme Court was unable to deny that "the obligations to register, and to pay the occupational tax created for petitioner 'real and appreciable', and not merely 'imaginary and unsubstantial' hazards of self-incrimination." The petitioners' convictions were reversed. The defense of self-incrimination privilege was held to reach both the convictions for failure to register and to pay the occupational tax.

Neither *Marchetti* nor *Grosso* holds that the wagering tax provisions are constitutionally impermissible, but only that their validity will depend on an "assessment of the hazards of incrimination which result from literal and full compliance with all the statutory requirements." In these two cases, the statutory obligations were directed almost exclusively at individuals "inherently suspect of criminal activities." Under such circumstances, the taxpayer was confronted with "substantial hazards of self-incrimination" and therefore shielded from the penalties prescribed by the wagering tax statutes.

In *Haynes*, the petitioner was charged with violation of the National Firearms Act. The specific count averred that the appellant knowingly possessed a firearm which had not been registered with the Secretary of the Treasury, as required by statute. The petitioner moved to dismiss the count, asserting that the statute violated the Fifth Amendment since satisfaction of his obligation to register would have compelled him to provide information incriminating to himself. The District Court upheld his conviction, and the Supreme Court granted certiorari.

The obligation to register was conditioned simply upon possession of a firearm within the meaning of Section 5848. The manufacturer or importer need not register but all others must "furnish the Secretary of the Treasury with his name, address, place where the firearm is usually kept, and the place of his business or employment. Further, he must indicate his date of birth, social security number, and whether he has ever been convicted of a felony. Finally, he must provide a full description of the firearm." Failure to comply with any of the Act's requirements was punishable by fine and imprisonment.

The Supreme Court reiterated that the registration requirement was "directed principally at persons who have obtained possession of a firearm without complying with the Act's other requirements, and who therefore are immediately threatened by criminal prosecutions under the Act". As in *Marchetti* and *Grosso*, the registration section of the Act is aimed primarily at persons "inherently suspect of criminal activities". The obvious fact that the failure to register need only precede the moment at which the accused is charged results in the great likelihood that a prospective registrant will be subject to prosecution. Under these circumstances, the Supreme Court held that the risks of criminal prosecution must be termed as real and appreciable. Petitioner's conviction was reversed.

Comment: These cases do not limit the power of Congress to tax unlawful activities. However, the Congressional schemes for enforcing and collecting the tax are open to review. In the above cases, the methods employed were held unconstitutional.

The dissent in the *Marchetti* case considered the harmful effects on society from declaring the registration sections unconstitutional. Since gambling is illegal in almost all jurisdictions, gamblers must necessarily "operate furtively in the dark shadows of the underworld". The business of gambling is so clouded with secrecy as to demand some kind of public disclosure and regulation. The Supreme Court, by invalidating the registration sections, is in effect giving to gamblers and the holders of firearms a "protected shield under which they can carry out illegal activities". The Supreme Court seems to have created "a special constitutional privilege of nonregistration" for those desiring to engage in illegitimate activities.

Whereas Congress has incidentally provided an aid to law enforcement, the Supreme Court has used this purpose as an excuse to invalidate the

legitimate Congressional power to collect revenues. Furthermore, registration schemes are often employed against legal activities and yet the Supreme Court has all but closed out their attempted use for illegal activities. The Fifth Amendment has therefore done more to hinder law enforcement agencies than to protect innocent members of society. However, the protection of our constitutional rights is not to be balanced against the possible benefits derived from disregarding them in particular cases. These cases are ideal illustrations of holding as supreme the protection of our constitutional rights.

Informer Who Testifies At Trial Must Give True Name—*Smith v. Illinois*, 88 S.Ct. 748 (1968). Defendant was convicted for the illegal sale of narcotics. At defendant's trial the prosecution's principal witness was a man who identified himself on direct examination as "James Jordan". This witness testified that he purchased a bag of heroin from defendant in a restaurant with marked money. Defendant's version of the alleged sale was completely different so that the main question at the trial was the relative credibility of defendant and this prosecution witness.

On cross-examination "James Jordan" was asked if that was his real name, and he responded that it was not. The witness was then asked what his correct name was, and the court sustained the prosecutor's objection to that question. The defense then asked the witness where he lived, and again the court sustained an objection. Defendant contends on appeal that the court's rulings on these objections denied him the right to confront witnesses as guaranteed by the Sixth Amendment.

The United States Supreme Court reversed the Illinois courts and followed the Sixth Amendment standard as stated in *Alford v. United States*, 382 U.S. 687 (1931), and made obligatory upon the states by the Fourteenth Amendment in *Pointer v. Texas*, 380 U.S. 400 (1965). Although the Court was fully aware that there had not been a complete denial of the right of cross-examination, it stated that, "when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bring out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives." Such information, the Court continued, opens countless avenues of in-court examination and out-of-court investigation. Quoting from *Alford* the Court said that "the extent of cross-examination with respect to an appropriate

subject of inquiry is within the sound discretion of the trial court", but the court has no obligation to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination. The right of an accused to be confronted with the witnesses against him is to be determined by the same standards whether a federal or state proceeding is involved.

Mr. Justice Harlan dissented on the ground that the record raised serious doubt that defendant was denied any information he did not already have. He, therefore, argued that the trial court's rulings were either harmless error or at least made the issue inappropriate for constitutional adjudication, and the writ of certiorari should be dismissed as improvidently granted.

Propriety Of Abstention When Statute Challenged As Void For Overbreath—*Zwickler v. Koota*, 389 U.S. 241 (1967). The appellant was convicted in a New York court for violation of a state statute which made it a crime to distribute, in quantity, for another person, a handbill containing any statements concerning any candidate in connection with any election of public officers unless the handbill also showed the name and address of the printer and the person for whom the handbills were printed. The conviction was first reversed by the New York Supreme Court and then affirmed without opinion by the New York Court of Appeals.

The appellant then sought in the federal district court a declaratory judgement that the statute was unconstitutional and injunctive relief against further criminal prosecutions under it. He invoked the jurisdiction of the district court through the Civil Rights Act, 28 U.S.C. § 1343, and the Declaratory Judgement Act, 28 U.S.C. § 2201. He contended that the statute was repugnant to the guarantee of free expression in the federal constitution; that it suffered from "overbreath" because it covered anonymous handbills both within and outside of the first amendment protection. The district court dismissed on the basis of the doctrine of abstention.

The Supreme Court first considered whether this dismissal would have been proper if injunctive relief had not been sought. It argued that the duty to give due respect to the suitor's choice of a federal forum for decision of claims arising from the federal constitution, laws, and treaties has been imposed on federal courts on all levels. This duty cannot be

escaped on the ground that state courts also have a duty to protect these rights and thus there is another forum in which these claims may be adjudicated.

The Supreme Court recognized that the district court properly could have dismissed the action under special circumstances—if a state court might have been able to construe the state statute to avoid or modify the constitutional question. But it felt there was no way that the question could be avoided or modified in this case because of the nature of the claim appellant presented. The claim that "... a governmental purpose to control or prevent activities constitutionally subject to state regulation [has been] achieved by means which sweep unnecessarily broadly and thereby invades the area of protected freedoms," *NAACP v. Alabama*, 377 U.S. 288, 307 (1964), cannot be modified or avoided by construction of the statute. The "void for overbreath" claim was contrasted with that of "void for vagueness" because a constitutional question of vagueness might be avoided by a state court decision construing the challenged statute narrowly.

This court reasoned that abstention in cases similar to the present one could defeat the purpose of the Civil Rights Act because First Amendment rights might be "chilled" by the delay of state court proceedings. Therefore a federal court should not abstain simply to give the state courts the first opportunity to vindicate the federal claim.

The Supreme Court then considered the effect of the inclusion of a plea for an injunction against further prosecution under the statute. The district court had abstained from ruling on the request for injunctive relief because it felt the appellant had not shown special circumstances entitling him to such relief. The Supreme Court agreed that district courts should hesitate to interfere with threatened criminal prosecutions in state courts, but argued that this was not a usual case because of the declaratory judgement also sought. It held the district court was wrong in deciding that, since there were no special circumstances required to issue an injunction, there were also no special circumstances which would defeat the application of the abstention doctrine. The Supreme Court noted that "... the abstention doctrine is inappropriate ... where ... statutes are justifiably attacked on their face as abridging free expression ..." *Dombrowski v. Pfister*, 380 U.S. 479, 489-490 (1965). It held the federal district court

had a duty to decide the appropriateness and merits of a request for a declaratory judgment, whether or not it concluded the issuance of an injunction was proper.

Justice Harlan occurred in a separate opinion. He stated that he was troubled by the opinion if it was intended to suggest that the appearance of either an overbreath or a vagueness allegation was a central factor in determining if abstention is appropriate. He noted that neither of these terms has been "definitively delineated" by the Supreme Court; thus a doctrine based on supposed differences between these allegations would have no foundation. He argued that there is no reason to rule that all cases with allegations of overbreath are inappropriate for abstention. A district court could reasonably decide to abstain in a particular case to prevent friction with state officials or because a state determination might cause the federal issues to be presented differently. He also remarked that such an overbreath-vagueness standard would reduce the doctrine of abstention to a pleader's option.

Defense Facility Prohibition Of The Subversive Activities Control Act Struck Down—*United States v. Robel*, 88 S.Ct. 419 (1967). The Government appealed a district court dismissal of an indictment for violation of §5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784 (a)(1)(D), which provided that when a communist action organization is under a final order to register, it shall be unlawful for any member of the organization to engage in any employment in any 'defense facility'. The appellee Robel had been employed in the shipyard of Todd Shipyards Corp. for several years when the Secretary of Defense, under authority delegated by §5(b) of the act, designated it a 'defense facility'. Shortly thereafter the defendant was indicted.

The Supreme Court affirmed the district court decision on the ground that §5(a)(1)(D) violated the right of association protected by the First Amendment. The Court held that here, as in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), "the clarity and preciseness of the provisions in question makes it impossible to narrow its indiscriminate cast and overly broad scope without substantial rewriting". It found this section to cut indiscriminately across all types of association without regard to the quality and degree of membership and thus violate the First Amendment.

The Court rejected the Government contention

that this statute was justified as an exercise of the war power. The Chief Justice said that the war power, "can not be invoked as a talismanic incantation to support any act of congress that can be brought within its ambit". While the goal of promoting national defense is valid the Court said that the means used to achieve it must be measured against the prohibitions of the First Amendment. This section was held to establish guilt by association alone, without requiring any proof as to the individual's threat to the nation. The Court held that the goal desired must be achieved by means which have a less drastic impact on the continued vitality of First Amendment freedoms.

Mr. Justice Brennan, concurring in the result, preferred to base his decision on what he felt was an unconstitutional congressional delegation of authority to the Secretary of Defense, allowing him wide discretion in deciding what constituted a 'defense facility'. He felt that §5(b) gave the Secretary too wide a power to decide general policy questions about national security, without providing adequate procedural safeguards. The delegation was, therefore, unconstitutionally vague, especially since it dealt with fundamental rights protected under the First Amendment.

Mr. Justice White, joined by Mr. Justice Harlan, dissented, calling the right of association a "judicial construct" which should not be considered absolute. In a balancing between national security and freedom of association, he submitted that he preferred the Congress' judgment that the defendant's interest in remaining both in his job and in the party was the less substantial of the two, since the legislature is in a better position to decide this type of issue than are the courts.

Right To Counsel In State Probation Revocation Hearing At Which Deferred Sentence May Be Imposed—*Mempa v. Rhay* and *Walkling v. Washington State Board of Prison Terms and Paroles*, 88 S.Ct. 254 (1967). Petitioners Mempa and Walkling were convicted of "joyriding" and burglary in the second degree, respectively, and were placed on probation. Both were subsequently brought before the Washington courts and charged with having breached the conditions of their probation. Mempa was accused of having been involved in a burglary and Walkling was accused of having left the state contrary to the terms of his probation. Neither had counsel nor was offered court-appointed counsel at his probation revocation hearing. At each petitioner's hearing, a probation

officer testified without cross-examination. No record was kept of Walking's hearing. Mempa was given no opportunity to defend himself. Probation was revoked in each case and the petitioners were then sentenced. Both petitioners filed habeas corpus petitions which the Washington Supreme Court denied and on which the United States Supreme Court granted certiorari.

The Court unanimously held that the right to counsel attaches to state probation revocation hearings at which a deferred sentence may be imposed. The right to counsel was recognized in several special circumstances prior to 1963, including one case involving sentencing, *Townsend v. Burke*, 334 U.S. 736 (1948). In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court held that the Sixth Amendment as applied through the due process clause of the Fourteenth Amendment was applicable to the states and, accordingly, that there was an absolute right to appointment of counsel in felony cases. Read together, *Gideon* and the previous cases "clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected". The fact that the prison board makes the final determination of the sentence, the court merely recommending a certain term, does not alleviate the right to have counsel at the time the court considers this recommendation. Furthermore, certain legal rights, such as the right to appeal from a guilty plea induced by the offer of probation, might be lost at the probation revocation hearing if counsel were not present to see that they were preserved. Therefore, counsel must be present at such a hearing. The cases were reversed and remanded.

Comment: This case is one of the few to reach the Supreme Court on the issue of procedural rights in a probation revocation proceeding. This is a cloudy area of the law and the procedures to be followed have been left to the states and individual courts. Some hoped that this case might lead to major constitutional requirements regarding a probationer's procedural rights. These requirements might include a hearing, notice of the charges, right to counsel, right of indigents to have court-appointed counsel, right to present evidence and witnesses, right to cross-examine witnesses, right of appellate review, etc. At present, most jurisdictions recognize the right to have retained counsel present but there is a definite conflict of authority as to whether the courts are required to

appoint counsel for indigents. Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. Crim. L.C. & P.S. 175 (1964). But Mr. Justice Marshall confined his opinion to the sentencing issue, that is, probation revocation proceedings at which a deferred sentence may be imposed. The arguments as reported at 2 Crim. L. Rep. 2036 (1967) indicate that the Court wished to proceed cautiously.

Prior Convictions Obtained When Defendant Did Not Have Counsel Are Not Admissible Under Recidivist Statute—*Burgelt v. Texas*, 88 S.Ct. 258 (1967). Defendant was convicted of "assault with malice aforethought with intent to murder, repetition of offense," and was sentenced to ten years in the state penitentiary. In the indictment the state first alleged the facts upon which the assault charge was based. Then pursuant to the Texas recidivist statutes, the indictment further alleged that the defendant had been convicted of four previous felonies, once in Texas for burglary and three times in Tennessee for forgery. Under the statute defendant would have been sentenced to life imprisonment if the three prior felony convictions had been proven. The prosecution read the entire indictment to the jury at the beginning of the trial and over objection introduced evidence regarding the burglary and two of the forgery convictions. At the end of the trial the court decided that the convictions were voided by the defendant's lack of counsel and instructed the jury not to consider the prior offenses for any purpose whatsoever in arriving at the verdict. The Texas appellate court upheld the convictions. Since the defendant had not suffered the enhanced punishment provided by the recidivist statute, and since instructions had been given to disregard the previous convictions, it felt that no error was presented.

The Supreme Court of the United States reversed the convictions. The majority held that the introduction into evidence of the prior convictions, obtained without providing counsel for the defendant, violated the rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963). Here the defendant was made to suffer once again for the deprivation of his Sixth Amendment right. The Court stated that the certified records of the Tennessee convictions raised the presumption that the defendant had been denied the right to counsel in those proceedings since a valid waiver cannot be presumed from a silent record. Furthermore, the Court found that

the introduction of these improper convictions for the purpose of enhancing punishment was inherently prejudicial and the majority was unable to state that the instructions to disregard them made the constitutional error harmless beyond a reasonable doubt.

Chief Justice Warren in a concurring opinion viewed the decision as a laudable limitation of *Spencer v. Texas*, 385 U.S. 554 (1967) in which the Court had upheld this state procedure of introducing past convictions into evidence in order to increase punishment.

In a terse dissent Justice Harlan, joined by Justices Black and White stated the view that the convictions should be upheld because the error had been corrected by the trial judge's instruction to disregard the prior convictions.

Statements Of An Informer As The Basis Of Probable Cause—*Spinelli v. United States*, 382 F.2d 871 (8th Cir. 1967). Appellant Spinelli was convicted of interstate travel in aid of racketeering. The judgment was reversed on the grounds that Spinelli had standing to object to the search of an apartment he was not actually occupying and that the affidavit in support of the search warrant did not establish probable cause. The court ordered a rehearing on the petition of the government. Spinelli objected to the rehearing as a violation of his constitutional protection against double jeopardy. The majority rejected this argument on the basis that since no mandate issued in this case, the court retained jurisdiction over the cause and could thus rehear and, if necessary, modify its decisions.

The search warrant complained of was obtained on the basis of an affidavit which recited some instances where Spinelli traveled from East St. Louis, Illinois, to St. Louis, Missouri. It also stated Spinelli visited a certain apartment each day, that this apartment was known to contain two telephones, that Spinelli was known to the affiant and local law enforcement officials as a bookmaker and gambler, and that a reliable informant told the FBI Spinelli was using the telephones in the apartment to take bets.

Upon rehearing, the court held Spinelli had standing to object to the search of the apartment. It reasoned that a person aggrieved by a search has standing to object to it. Since the Fourth Amendment is designed to protect privacy, a person can show he was aggrieved by showing his privacy was invaded. Even though the individual

was not present when the premises were searched, if that individual has a legal right to occupy the premises or is legally occupying them, his personal privacy has been invaded. The court found Spinelli's right to be on the premises was established by statements in the affidavit that he used the apartment, by the fact that Spinelli had been alone in the apartment for at least two hours on the day the search warrant was executed, and by the fact that he had a key to the apartment when he was arrested. Since the court found Spinelli had sufficient interest in the premises to be a person aggrieved, he was permitted to question the showing of probable cause supporting the search warrant.

The majority of the court decided the information in the affidavit established probable cause for the issuance of the search warrant. Spinelli's conviction was thus affirmed. While admitting that the individual pieces of information in the affidavit would not support a warrant, the majority felt the affidavit as a whole was legally capable of persuading the commissioner that an illegal act was being committed in the apartment. The hearsay evidence which was the core of the affidavit (the statement that the FBI had been told by a reliable source that Spinelli was taking bets in the apartment) was reasonably corroborated by other evidence and thus could serve as the basis for probable cause. The hearsay evidence was corroborated by information from the telephone company and by the observations by the agents of Spinelli's movements. On the basis of *United States v. Ventresca*, 380 U.S. 102 (1965) the majority argued that the technical requirements for a constitutional warrant should not be rigidly interpreted. The Fourth Amendment was designed to prevent invasions of privacy under a general authority. In this case there was no unjustified intrusion into Spinelli's affairs. Before obtaining the warrant, agents observed his interstate travel and investigated his presence in the apartment where gambling was alleged to take place in order to substantiate the information received from the informer.

Two of the judges, while agreeing Spinelli had standing to object to the search, dissented from the majority's finding of probable cause and would consequently have reversed Spinelli's conviction. They differed from the majority in that they felt that in order for hearsay to be the basis for probable cause, certain requirements must be met. The informer must be shown to be reliable, the informa-

tion must be precise as to time and place, the information must be based on the informer's personal knowledge, and the police must have acted promptly upon receipt of the information. These judges were more concerned with the technical requirements for a constitutional warrant than the majority. Because these requirements were not met, these judges felt the hearsay evidence could not provide the basis for probable cause.

The minority stated further that the other facts stated in the affidavit (even if considered with the informer's statements) did not support a finding of probable cause. Since there was no showing that bookmaking was taking place in the apartment, the facts that Spinelli was observed traveling between East St. Louis and St. Louis and that he was observed entering an apartment complex where there was an apartment containing two phones were not enough for probable cause. The statement that Spinelli was a known bookmaker was a factor the commissioner might have considered if there had been any credible supporting evidence, but the minority argued there was no such evidence. (In examining the pieces of information in the affidavit the minority approach differed from that of the majority in that the minority looked at each piece individually while the majority looked at the total picture presented by taking all the pieces together.)

Cautionary Instructions On The Character Of An Informer Required—*United States v. Griffin*, 382 F.2d 823 (6th Cir. 1967). Griffin was convicted of violating the narcotics laws on the basis of the testimony of a paid informer who was an addict. The informer told narcotics agents that Griffin offered to supply him with drugs and told him to contact a Miss Lewis to place an order. Two such purchases were arranged and made. In both cases the conversations between Lewis and the informer were monitored by an agent. Griffin's car was observed in the vicinity of the informer's apartment about the time each sale took place. Lewis and Griffin were indicted for violation of the narcotics laws and tried jointly. During the trial Lewis changed her plea to guilty and the judge then told the jury her case had been disposed of. Only the informer and three agents testified at the trial of Griffin.

Griffin's primary attack on the trial court's decision was directed at the failure of the trial judge to give the jury *sua sponte* special cautionary instructions to the effect that the testimony of the

informer was to be reviewed with caution and carefully weighed. The Appellate court would not accept the proposition advanced by Griffin that the testimony of a paid informer who is a narcotics addict will not be allowed to stand without substantial corroboration. But it noted the prevailing rule, as stated in *Todd v. United States*, 345 F.2d 299 (10th Cir. 1965), that special cautionary instructions are required where the informer's testimony is uncorroborated; even where his testimony is corroborated in critical respects, careful instructions drawing the attention of the jury to the character of the informer's testimony are favored.

The court decided cautionary instructions should have been given and thus granted a new trial. It found all the direct evidence of Griffin's participation in a plot to violate the narcotic laws was "tainted in critical respects by its source." It recognized the informer's testimony concerning Lewis was corroborated and thus felt there was danger that the jury might have transferred the guilt of Lewis to Griffin on the basis of the common plan alleged to exist between them. The failure to give a cautionary instruction was considered plain error—in spite of the fact that such an instruction was never requested.

Comment: This decision is unclear on two points. The court never stated clearly whether or not it considered the informer's testimony corroborated. This is the key inquiry under the rule which the court purports to apply. If the informer's testimony is corroborated, a cautionary instruction is favored but not required. If it is not, failure to give such an instruction is reversible error. Nor did the court state specifically whether the reversal resulted from judicial error or the fault of defense counsel. Consequently it is hard to tell what this court really decided.

The court apparently felt the informer's testimony was substantiated to some extent, but not enough to bring it clearly under the part of the rule concerned with corroborated testimony. The court also apparently felt that both the trial judge and defense counsel were at fault. The attorney should have requested cautionary instructions. The judge erred in not taking notice on his own motion of the attorney's failure to request these instructions when it was (or should have been) obvious to him that the defense attorney intended to make this request.

According to this view of the decision, the court has not really applied the *Todd* rule but has ex-

tended the rule to allow reversal of a lower court decision because the trial judge failed to correct what the appellate court considered an obvious error on the part of the defense attorney.

The entire decision is based on the assumption that the defense attorney intended to request a cautionary instruction but forgot. This assumption is, however, generally unsupported. The court sought justification for this assumption by pointing out that Griffin's attorney relied heavily upon the "tenuous character" of the informer in a motion for acquittal and in his argument to the jury. But the same facts could just as easily be used to support the proposition that the defense attorney never intended to request this instruction. Since the trial judge rejected the argument that the jury should not be allowed to speculate on the unsubstantiated testimony of an informer when this argument was advanced as the basis for an acquittal, the defense attorney might have decided it was futile to advance this argument in an attempt to obtain cautionary instructions.

But whether Griffin's attorney actually forgot to request the instruction or whether he never intended to request it, it is surprising that the court did not consider the failure to make a seasonable request a waiver of the right to request such an instruction. In the same case this court rejected other attacks on the conviction because it found these grounds of attack related to "matters occurring during the trial, to which no objection was interposed at the time. Such failure of seasonable objections constituted a waiver of these objections." (p. 824). It is surprising that the failure to make a seasonable request for a cautionary instruction was not treated in the same way. If it is not treated as a waiver, an undesirable change in the judicial process could result. Appellate courts might be called upon to consider every jury instruction actually given and every one which might have been given by the trial judge. This would require the appellate courts to examine an unnecessary number of issues and would allow them to rule upon the validity of objections and requests which were never presented to the trial judge.

Stopping For Traffic Violation Does Not Justify Unlimited Search—*State v. Campbell*, 235 A.2d 235 (N. J. Super. 1967); *People v. Tate*, 230 N.E.2d 697 (Ill. 1967). In *Campbell*, the defendant was convicted of possession of lottery slips. The defendant was stopped for a traffic violation, and when he could not produce a license or registration for the

car, he was informed he would be locked up for being an unlicensed driver. Before being put into the police car, he underwent a customary pat-down or frisk, at which time the officer felt a bulge. The officer investigating the bulge found it to be an envelope. The officer looked into the envelope and found lottery slips. The defendant contended the search was unreasonable and the evidence should have been suppressed. The court, while recognizing the reasonableness of a pat-down for weapons as an incident of a traffic arrest, held that such a frisk should be limited to dangerous weapons to protect officers, and did not authorize the search for contraband, evidentiary material or anything else in absence of reasonable grounds for arrest. The court in applying the exclusionary rule, said once the officer ascertained that the defendant did not possess a weapon, the investigation should have stopped.

In *Tate*, the defendant was convicted of gambling. Defendant had been stopped for a traffic violation and officers noticed an envelope in his pocket. The defendant told the officers he worked for a policy wheel and he was arrested. Inside the envelope the arresting officers found policy slips. There was conflicting testimony whether defendant's admission occurred before or after the police obtained the envelope. The court held that the envelope itself and belief that it contained policy slips were subjective and insufficient basis for search, unless predicated upon objective facts. The court said the search was not justified merely because the defendant had been stopped for a traffic offense. The case was remanded to determine whether the admission or search of envelope occurred first, for if the admission was first, the search was valid for police had probable cause that the envelope contained slips.

Both cases hold that the stopping for a traffic violation does not justify unlimited search of the defendant. Search for evidence not connected with the violation is forbidden, unless there are objective facts or unusual circumstances that reasonably might lead the police to believe that the defendant was involved in some criminal activity apart from the traffic violation.

Exclusionary Rule Not Applied To Illegal Searches By Mexican Authorities—*Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967). During defendant's trial for conspiring to smuggle narcotics into the United States, amphetamine tablets found in defendant's car were admitted into

evidence. These tablets were seized in Mexico by Mexican authorities who search the car without a warrant. The defendant claimed that the tablets were the fruits of an illegal search and should not have been admitted into evidence. The defendant also assigned error to the failure of Mexican authorities to take him before a magistrate.

The court affirmed the conviction, refusing to apply the exclusionary rule or the *McNabb* doctrine to Mexican officials. The court noted that no officer of the United States participated in the seizure or the questioning, and that the Mexican officials were not acting at the instigation of United States custom officials. The court held that neither the Fourth nor the Fourteenth Amendments were directed at Mexican authorities, and that no prophylactic purpose would be served by applying the exclusionary rule or the *McNabb* rule since they would not alter the police procedures of the sovereign Nation of Mexico.

The court also rejected defendant's argument that there was no proof of a crime committed in the United States and that regardless of what happened in Mexico, no crime was committed in the United States for which he could be tried. The court inferred that Congress intended that smuggling should extend to foreign countries at least as to citizens of the United States, since smuggling by its very nature involves foreign countries, and that the accomplishment of the crime always requires some action in a foreign country.

Marijuana Smell Gives Reasonable Cause To Arrest And Search—*People v. Barcenas*, 59 Cal. Rptr. 419 (Ct. App. 1967). The issue in this case was whether defendant had been convicted with evidence secured through an illegal search and seizure. An officer of the Los Angeles airport police had warned an airport ticket agent to be on the lookout for Cuban aliens who were smuggling marijuana to New York City. They carried new leather suitcases which would be overweight. Subsequently, a man fitting this description approached the airport ticket agent, purchased a ticket to New York City, checked in his overweight luggage (which the agent placed on a conveyor to the outbound luggage room), and proceeded to the waiting area. The agent then called the police officer and they went to the outbound luggage room. The officer, who was an expert at detecting, through his sense of smell, the presence of marijuana inside suitcases, smelled marijuana in defendant's suitcase. The agent pointed out the

defendant and the officer arrested him. The officer then removed three keys from defendant's person and opened the suitcase, finding bricks of marijuana inside.

The officer's expertise at smelling marijuana was well-established so that there was reasonable cause to make an arrest. The officer's reliance on the agent's identification of the defendant was held to be reasonable. In fact, the court said, the agent was a disinterested observer whose motives were not open to question as would be the motives of the usual type of informer in narcotics cases. The search and seizure was therefore justified as incident to a lawful arrest.

Observation Of Motel Room Through Vent Violated Fourth Amendment—*State v. Kent*, 432 P.2d 64 (Utah 1967). The defendant appealed from his conviction for unlawful possession of a narcotic on the grounds that the trial court erred in denying his motion to suppress evidence found in the search of his premises. The police, suspecting that the defendant had been involved in some drug store robberies in which narcotic drugs had been stolen, obtained consent from the manager of the motel where the defendant was staying to use the attic as a hidden vantage point to observe the suspect. By looking through a vent in the ceiling of the defendant's bathroom, the police officer could observe the entire bathroom and parts of the living room of the unit. No part of the ventilator system was removed to facilitate the surveillance. The attic was common to the entire motel and the police had entered through a stairway in the manager's office. On the second day of the surveillance, the officer observed the defendant taking what looked like a 'fix'. He radioed this information to other officers stationed outside the motel who entered the defendant's unit without a search warrant and arrested him. A search of the unit was carried out with the help of the officer in the attic and the narcotics were located.

The defendant contended that the evidence thus obtained resulted from an unlawful invasion of his premises and privacy in violation of the Fourth and Fourteenth Amendments. The state claimed that there was no physical trespass or unlawful entry into the premises of the defendant since the observation from the attic was available to everyone and the vent was in no way tampered with. Since the officer had cause to believe a felony was being committed, the entry, arrest, and seizure of the evidence was justified. The court, citing *United States v. Silverman*, 365 U.S. 505, 511

(1961), said that Fourth Amendment rights were not to be based on the niceties of property or tort law. Rather the reasonableness of a search depended on the degree of privacy which the defendant enjoyed in the premises. Since the Fourth Amendment applied to rented and leased premises, the defendant had a right to maintain his place of abode free from outside intrusion and observation. Since the evidence was obtained illegally by means of an exploratory search which violated the defendant's right of privacy, the trial court should have granted defendant's motion to suppress.

The strong dissent argued that the element of physical trespass was still necessary to make a search unreasonable. When an officer observed a crime from a place where he had a legal right to be, any evidence obtained by such a search ought to be admitted.

Protective Custody Search Violated Fourth Amendment—*Kleinbart v. State*, 234 A.2d 288 (Md.Ct.Spec.App., 1967). A state trooper noticed the highly erratic driving of defendant Mullin and charged her with driving "under the influence." Defendant Kleinbart, her passenger, was charged with public intoxication, and both were taken to a police station. Mullin was charged with driving under the influence of narcotics when a test showed she was not intoxicated. Kleinbart was sent to a hospital. The car Mullin had been driving was owned by her sister; Mullin had been given permission to use it. When Mullin was originally charged, the car was towed to a service station, locked, and parked in a brightly lit area in front of the station.

Some time after Mullin was charged a trooper went to the car and removed various articles from it. The officer testified he did this to protect the property and that as he removed these article he suspected they might have been stolen because he saw a man's name other than Kleinbart's engraved on a watch.

Kleinbart voluntarily returned to the station at the request of a trooper. At this time there was no knowledge that a crime had been committed and Kleinbart was not arrested. Kleinbart told the officers he knew nothing about the property and that it was not to his knowledge stolen. Calls were made to some people whose names appeared on the property. One of these people reported his apartment had been broken into. He accompanied a trooper to the service station where the car was parked. As the officer finished "cleaning out" the car, this man identified several articles in the car

as taken from his apartment. Kleinbart and Mullin were charged with and convicted of grand larceny.

The defendants contended that the searches of the automobile and the seizure of articles found in it were too remote in time and place to be supported as incident to the arrest. The state argued that the articles were originally taken into protective custody only and that the property was not seized until the officers knew that an apartment had been ransacked and until Kleinbart had denied knowledge of the property.

Defendants relied upon *Preston v. United States*, 376 U.S. 364 (1964) in support of their position. In *Preston* the Supreme Court noted that contemporaneous searches are designed to allow seizure of weapons and other things which might be used to assault an officer or effect an escape and to prevent destruction of evidence of a crime. The Supreme Court also noted these justifications are present only when the search is not too remote from the crime. This court accepted the "remoteness" test and found the searches too remote because they were made one and one-half and seven hours after both defendants were arrested and the car towed to the service station.

The state urged that *Preston* was inapplicable and that this case should be decided under the rationale of *Cooper v. California*, 386 U.S. 58 (1967), where a warrantless search and seizure was upheld even though made a week after the arrest. This court felt *Cooper* was inapplicable because it dealt with narcotics and thus the search could not be attacked on the basis of remoteness. According to California law, a car used in the illegal transport of narcotics is subject to forfeiture. Thus the police are required to seize the car and hold it as evidence until the forfeiture proceedings are completed. Under these circumstances, the search of the car was considered reasonable in *Cooper*.

This court also rejected the "protective custody" argument. While it recognized there are situations in which the police may appropriately take articles into protective custody, it felt the present case was not in this category. *St. Clair v. State*, 232 A.2d 565, (Md. 1967) was noted as an example of a situation where the protective custody argument would be accepted. In that case articles removed from a car without a warrant four days after the owner was arrested for an unrelated offense were admitted into evidence in a prosecution for breaking and entering—even though these articles were not known to be stolen at the time they were removed.

This court felt the factors which prompted the *St. Clair* court to accept the protective custody argument were not present here. Defendants were charged with crimes for which they were entitled either to immediate hearings or release upon giving bond; *St. Clair* was to be held for the authorities of another state. This car was locked and parked in a well-lighted area; *St. Clair's* car was parked near the jail and had one door which would not lock. This court also noted that the trial judge in *St. Clair* made a finding of fact that the sole purpose of the police in listing *St. Clair's* property was to preserve it against loss; the trial judge in the present case made no such finding.

Deciding further that both defendants had standing to object to the introduction of the evidence obtained as a result of these unreasonable searches and seizures, the court reversed the lower decision and remanded the case for a new trial. Mullin was found to have standing to object because she was in possession of the car (with the permission of the owner) at the time of her arrest. Kleinbart was considered to have standing to object because he had been a passenger immediately before his arrest and thus could not help being identified with the contents of the automobile. The court felt that should he not be allowed standing to object he would be "... subjected to the penalties meted out to one in lawless possession while refused the remedy designed for one in that situation." (p.303). The court followed the principle that the object of the Fourth Amendment is the protection of privacy and thus did not require that Kleinbart show a superior possessory interest in the articles seized, since under the circumstances, his presence in the automobile gave him standing to object.

Warrantless Search Incidental To Arrest For Traffic Violation Inadmissible—*Grundstrom v. Beto*, 273 F. Supp. 912 (N.D. Tex., 1967). Defendant applied for a writ of habeas corpus following conviction for armed robbery. He contended that the stolen money and a gun, hidden in a car, seized by a police officer without a warrant, was inadmissible under the Fourth Amendment. The defendant and the driver were stopped four miles from the scene of the robbery, and the driver failed to produce his license when ordered by the police officer. After placing the defendant and the companion in a police car, the officer tore out the kickboard beneath the glove compartment and found the evidence. The district court ruled the search

violative of the Fourth Amendment, and granted the writ.

The State claimed that while a warrantless search is held unreasonable without evidence of its reasonableness, the search here was incident to the arrest for driving without a license and therefore lawful. The court explained, however, that although a search incident to an arrest might be reasonable, the search must bear a relation to the crime investigated and charged. Here, the court said, "The search of the interior of a motor vehicle bears no relation to seeking the means by which a traffic offense was committed".

The court also rejected the argument that the officer's search was justified since he had reason to believe he was in danger or that the defendant was armed. Both the defendant and companion were guarded while they sat in the police car.

Further, the police officer did not have probable cause to suspect that defendant was guilty of the robbery. The testimony revealed nothing that would indicate the officer had suspected the defendant; there was no evidence upon which a magistrate would have issued a search warrant.

It was also held that the defendant did have standing to object to the search even though he was not the owner of the car. The court said that "... the only requisites for standing are legitimate presence by an individual [at the scene of the search] and the attempted use against him of the evidence wrongfully obtained".

Personal Service of Search Warrant Required For Search of Defendant's Truck—*Boyd v. State*, 204 So.2d 165 (Miss. 1967). Defendant was convicted for the illegal possession of drugs found in his parked pick-up truck by police detectives. These detectives followed the defendant's wife, who had possession of packages of stolen drugs, and witnessed her give the packages to an unidentified man in the parking lot where defendant's truck was located. The detectives later appeared before a Justice of the Peace, testified by way of affidavit that they believed the drugs to be stored in defendant's truck, and received a search warrant. Without first apprehending the defendant and serving him with the warrant, the detectives seized the goods from the truck. The defendant, who was subsequently arrested, was nearby at the time of the search and could have easily been found.

The Mississippi Supreme Court reversed the conviction and discharged the defendant holding

that it was improper for the detectives to search the truck without first serving the warrant upon the defendant especially since such service could have been easily obtained. The issue of personal service was not argued in the briefs on appeal.

The court concluded that without the evidence of the packages found in the truck, there were no grounds upon which the conviction could be upheld since there were no facts from which defendant's knowledge of the illegal possession could be inferred, and therefore discharged the defendant.

Speeding Conviction Based On Radar Device Is Reversed—*Biesser v. Town of Holland*, 156 S.E.2d 792 (Va. 1967). Defendant was found guilty of speeding. At the trial he was accused of operating his automobile at 48 m.p.h. in a 35 m.p.h. zone on the basis of a radar check by the arresting officer. Also, this policeman testified that he could not estimate the speed of the defendant's motor vehicle by any other means except the radar. Virginia law provides that the results of radar checks shall be accepted as prima facie evidence of speed when speed is at issue.

On appeal the state supreme court reversed. Noting that its prior decisions require that the Commonwealth prove that the device used for measuring speed had been properly set up and tested for accuracy, the court felt that the police had not met their burden in this case. Over objection, the arresting officer testified that he tested the reliability of the radar unit by means of a calibrated tuning fork. He further testified that the calibration was checked and found to be accurate by a member of another police force whose name he did not know. The court held that the accuracy of the device was not established since there was no evidence as to how the tuning fork was used. Nor was any evidence offered as to its reliability except for this inadmissible hearsay given by the police officer.

Defining Custody For The Application Of The Miranda Rule—*Morgan v. State*, 234 A.2d 762 (Md., 1967); *State v. Williams*, 432 P.2d 679 (Ore. 1967). The issue in these two cases was when was the accused in police "custody", thus requiring that he be advised of the constitutional protections afforded him by *Miranda v. State*, 384 U.S. 436 (1966). In the *Morgan* case, the principles of *Miranda* were held inapplicable to what the defendants did and said while he was not in an "arrest status." In the *Williams* case, the defendant was

held to have been in police custody and evidence obtained before the defendant was informed of his constitutional rights was held inadmissible.

In *Morgan*, the defendant was not arrested or in "custody" when the officers drove alongside the appellant and stated their belief that the men had taken narcotics at a nearby gas station. The *Morgan* court considered it well-established that "when one is approached by a police officer and merely questioned as to his identity and actions, this is only an accosting and not an arrest". Such questioning does not necessitate advising the defendant of his constitutional rights under *Miranda*. Moreover, *Miranda* does not require that the police advise "an accosted suspect that he need not submit to a search or that, if he does, that the fruits thereof may be used as evidence against him". The *Morgan* court did not feel that the arrest had taken place till after the officers had seen the narcotic paraphernalia, and, then, "the police had probable cause to arrest for felony of possession of narcotics".

In *State v. Williams*, the evidence was obtained after the defendants were in police "custody". The defendants, aged 19 and 17, were employed at a recently burglarized Co-op. They quit and left town soon after the burglary took place. The boys were sought for questioning, and upon being found, gave false identifications. At this point, the sheriff took the boys in "custody" by requesting them to accompany him to the police station on "runaway minor" and "vagrancy" charges.

An interrogation followed which led to the disclosure of a bus station locker which contained the "fruits of the crime." The defendants were then apprised of their constitutional rights and confessed soon thereafter. The police contended that the *Miranda* warning was not necessary till the defendants were the focal suspects of the burglary. The court held that pre-interrogation warning by the police was necessary to protect the defendants' Fifth Amendment rights not to be witnesses against themselves. The decision on appeal was that the trial court's admitting the evidence of the stolen goods and admitting defendants' confessions obtained upon further interrogation after police discovered the stolen goods was error.

Comment: The *Miranda* rule is aimed at coercive police practices. The *Williams* and *Morgan* courts distinguish between coercive and noncoercive police practices by looking for an actual arrest and "custodianship" of the defendant. This distinction fails to accommodate the coercive atmos-

where present in a situation like the one found in *Morgan*. Though the defendants there were not technically under arrest, they were certainly not free to leave without answering the questions posed to them.

When the defendants in *Morgan* were asked to pull off the road to answer questions, they were as much within police custody as if they were in the traditionally coercive atmosphere of the police station. They were deprived of their freedom of action in the very same sense as that which the *Williams* court held to require the *Miranda* warning. They could not run. They were bound to answer or submit to an arrest. The distinction fails to convince one of the self-definable characteristic of the concept of "custody." Police custody seems just as applicable to the *Morgan* situation as to the *Williams* case. Once the police have deprived a suspect of his freedom of action, he should be apprised of his constitutional rights under *Miranda*. Physical and psychological pressures can be administered on suspects just as easily in the *Morgan* case as in *Williams*.

Since protection from potential police abuse was the goal sought by *Miranda*, the definition of custody should be given a scope more appropriate to the attainment of this goal. This definition should be extended to include police interrogations which are intended to provide evidence for future convictions. In the *Morgan* case, it can be seen quite clearly that the police had every intention of arresting the suspected narcotics. Deprivation of freedom of action should be the key. Such deprivation occurred in *Morgan* as soon as the defendants were asked to pull over.

Arrest Status Based On Officer's Intent And Freedom To Leave—*State v. Williams*, 235 A.2d 684 (N.J., Cty. Ct. 1967). Defendant was indicted for murder, rape, robbery and assault, and at trial he moved to suppress certain evidence including a deposit plate and a charge plate issued to one of the victims and \$91 in currency.

Shortly after the crimes took place six to eight possible suspects' names emerged, including defendant's, as being potential leads. Two detectives were assigned to pick up defendant, and they located him the morning after the crimes at a local bar. Upon being asked by one of the detectives to come along to headquarters, defendant inquired as to whether he was going to be locked up. The detective replied, "No, you are not under arrest, I only want to talk to you". Defendant then volun-

tarily entered the police car and was driven to police headquarters. Upon arrival he was taken to the detective room whereupon he was asked to empty his pockets and whether he had any money on him. After defendant put 55¢ on the desk he was asked whether he had any more. Defendant replied, "I have" and proceeded to take a wallet from his pocket and throw it on the desk. The force of the throw caused the deposit plate and charge plate, upon which one of the victim's name appeared, to fall in open view on the desk. Defendant was then placed under formal arrest.

Defendant argued that he was arrested without probable cause prior to the formal arrest, and, therefore, the search for and seizure of the items sought to be suppressed, not being incidental to a valid arrest violated his Fourth Amendment rights against unreasonable searches and seizures and required suppression of the evidence so seized.

In denying defendant's motion the court held that defendant was not under arrest until after throwing the wallet down. Based on the testimony of the police officers involved, the court found that from the moment defendant was approached in the bar until the moment of his formal arrest at police headquarters he could have voluntarily left the presence of the police and was not in custody or under any restraint, and thus not under arrest. One criterion of an arrest is some physical restraint or a strong apprehension of restraint reasonably aroused in the suspect's mind. The court conceded that defendant might argue that it would have been unreasonable for him to consider himself as anything but arrested but it pointed out that no proof of this state of mind was adduced. Furthermore, an arrest also involves the officer's state of mind, and a suspect may feel detained or actually be detained and yet not arrested in the legal sense at all. The court also found that defendant's voluntary entry into the police car was no indication of arrest nor was the defendant under constructive or actual arrest merely because he was in the confines of the police headquarters.

Focusing upon the request made for defendant to empty his pockets, the court concluded that this was to make sure defendant had no concealed weapons as he had not been previously searched and was entirely reasonable during the investigatory detention period to protect the police.

Based upon the reasoning described and upon the further ground that defendant's revelatory action was a product of his free will and not police duress, the court held that all the items in evidence

were taken incidental to the lawful formal arrest and not in violation of the Fourth Amendment.

The court therefore disposed of defendant's Fifth and Sixth Amendment arguments. Defendant's money and wallet were not produced pursuant to a custodial interrogation to which *Miranda* applies, and, furthermore, defendant's acts of throwing the money and wallet on the desk were not evidence of a testimonial or communicative nature which is all the Fifth Amendment protects against. Finally, the court said that the search and seizure here was not a "critical stage" in the criminal process at which counsel is required under the Sixth Amendment.

Right to Speedy Trial Violated by Denial of Defendant's Motion to Appear As His Own Counsel—*People v. Addison*, 63 Cal. Rptr. 626 (Ct. App. 1967). Defendant was charged with grand theft, and a public defender was appointed to represent him. The deputy public defender asked the trial court for a twenty day continuance because the appointed defender was ill. The defendant then moved the court to allow him to try his own case. The court questioned him on his knowledge of the law and his ability to handle effectively the procedural aspects of the case. After the interrogation, the court denied the defendant's motion and allowed the continuance. Following the subsequent trial, defendant was convicted.

He appealed alleging that the granting of the continuance was a violation of his right to a speedy trial as guaranteed in California by statute. The Court of Appeals reversed the convictions and remanded with instructions to dismiss. According to the court's interpretation of the statute, a trial may be postponed for cause. The court reasoned that the defendant's motion to proceed in *propria persona* was erroneously disallowed, and thus the statutory requirement of cause for a trial continuance was not met. Therefore, the defendant had been denied his right to a speedy trial, and the court dismissed the charge.

Defendant's Shoe Type Aids Finding Of Probable Cause—*Sterling v. State*, 235 A.2d 711 (Md. Ct. App. 1967). Defendant was found guilty of rape, and the trial court sentenced him to death. The evidence of his guilt was clear and free from doubt. Defendant contended, however, that the seizure of his clothing and the taking of his finger and palm prints were the fruits of an illegal search

and thus inadmissible in evidence because the search was incident to an unlawful arrest. The question before the court, therefore, was whether there had existed probable cause for arrest without a warrant.

The rape was perpetrated late at night, and the following morning officers traced footprints leading to and from the window, through which the intruder had gained entrance, to within a short distance of the defendant's home. Prior to defendant's arrest one of the arresting officers was aware, from his examination of a footprint in the mud, that they were to look for a shoe with a crepe sole and finely woven cloth top. Upon locating defendant the officers testified that they "made certain observations" and took him into custody because he was wearing "the type of shoe [they were] looking for". After his arrest defendant was placed in the police car, and his shoes were removed. He was then taken to the victim's home "where his left shoe, after being matched to the footprint in the mud puddle, was determined to be similar". Thereafter defendant's home was searched, and he was fingerprinted and palmed.

In affirming the trial court's judgment the court of appeals held that the officers did have probable cause to arrest defendant. At the time defendant was taken into custody the police knew the man who assailed the woman was a Negro, stammered when he talked, had been wearing a certain kind of shoe and that footprints extended from the home of the victim and disappeared within a short distance of defendant's home. The court, quoting from *Farrow v. State*, 197 A.2d 434 (1964), went on to say that, although the record did not specifically indicate what was said by the victim when the police first arrived at her home, there would be a fair inference that she told them what she knew about the crime and identity of her assailant. All that is necessary for there to be probable cause to arrest is reasonable grounds for belief of guilt which requires less evidence than would justify conviction but more than a mere suspicion.

Confession Closely Following Morgue Viewing Held Involuntary As a Matter Of Law—*McKinley v. State*, 154 N.W.2d 344 (Wis. 1967). During defendant's trial on a second degree murder charge the state proposed to offer in evidence three verbal confessions and one written confession given to the police by defendant as a result of interrogations. After a hearing in the absence of the jury to deter-

mine voluntariness all four statements were admitted in evidence, and the jury subsequently returned a guilty verdict.

Defendant's first oral admission was made to officers after questioning at the scene of the murder. The second was made during an hour and one-half interrogation at the police station where defendant had been immediately taken. Fifteen minutes later defendant was taken by two detectives to the county morgue allegedly to identify the victim. Immediately after this viewing she was taken back to the station, questioned and again orally confessed. The next morning defendant was again taken to the morgue by two different detectives for identification purposes. Although the evidence was not clear as to how much of the victim's body defendant was shown, it was established that an autopsy had been performed earlier that same morning. Subsequent to this second viewing defendant was questioned and signed a written confession. Prior to all four statements *Miranda* warnings were given, and the trial court found all the confessions voluntary and free of psychological coercion.

The Supreme Court of Wisconsin reversed the conviction and the order denying a new trial and remanded for further proceedings. The court found identification of the victim unnecessary because there had been adequate identification by the deceased's two sisters. The court held the last two of defendant's four confessions inadmissible, noting that those two confessions were made an hour and one-half and forty minutes respectively after a viewing at the morgue stating:

We deem that where the confession follows the morgue viewing as closely in time as occurred here it should be held as a *matter of law* that the confession is the result of such psychological pressure as to render the same involuntary. (Emphasis added).

The court ordered a new trial even though the first two confessions were voluntary and admissible because of the United States Supreme Court holdings in *Chapman v. California*, 386 U.S. 18 (1967), and *Payne v. Arkansas*, 356 U.S. 560 (1958), that a state's harmless-error rule cannot be applied to a confession obtained in denial of due process. In *Payne* the Court held that admission in evidence, over objection, of a coerced confession will always vitiate a judgment and is such a constitutional error which can never be held to be harmless.

National Standards Should Be Used To Determine Obscenity—*Hudson v. United States*, 234 A.2d 903 (D.C. Cir. 1967). Defendants were convicted of staging obscene shows. On appeal they urged that the government's failure to introduce evidence to prove contemporary community standards in the nation as a whole was reversible error. The court of appeals agreed.

The court applied the test of obscenity first enunciated in *Roth v. United States*, 354 U.S. 476 (1957): whether to the average person applying contemporary community standards the dominant theme of the material appeals to the prurient interest. It then ruled that "contemporary community standards" should be determined by reference to a national norm and not by the customs of the local community. The court was concerned lest under a national Constitution entertainment permissible in one locale should be denied to the residents of a neighboring one. Then it was held that unless the production was patently obscene, twelve local jurors were not capable of determining the standards of tolerance prevalent in the nation generally without being given some competent evidence of what those standards are. The court reasoned that under the constitutional test "A guilty verdict in an obscenity trial should not be a legal expression of revulsion by the local community from which the jury is drawn." Thus the government by not offering proof of the national standards, failed to establish an essential element of the crime charged.

Chief Judge Hood dissented on two grounds. First, he contended that a local community standard should govern and therefore the jury was as well qualified to determine this question as any expert. Secondly, he did not feel that this burlesque show was entitled to constitutional protections afforded speech and expression. He felt that this show consisted almost entirely of conduct and was not a true expression of ideas, and so did not fall within the purview of the First Amendment. Thus he wrote: "I conclude that while all may agree that an artist may paint and exhibit a portrait of a nude, the artist has no constitutional right to walk down the street in the nude."

Comment: The courts are not in agreement as to whether local or national standards should be applied to such live performances. For the contrary view that local standards should apply, see *Newark v. Humphres*, 228 A.2d 550 (N.J. Super. 1967).

Nudist Magazine Held Not Obscene—*People v. Noroff*, 433 P.2d 479 (Cal. 1967). Defendants

were charged with violation of a statute which proscribes the possession of obscene material for distribution. The trial judge, after examining in chambers the challenged publication, a single copy of *International Nudist Sun*, ruled that it was not obscene and thus entitled to the constitutional protection of the First Amendment. The appellate court reversed this decision, but the Supreme Court of California agreed with the trial judge that this material was not obscene.

The supreme court noted that the magazine did explicitly depict male and female genitalia. But because most of these pictures portrayed entirely innocuous outdoor activities and none displayed any type of sexual activity, the court found they did not satisfy the test of obscenity laid down by the United States Supreme Court in *Roth v. United States*, 354 U.S. 476 (1957). The court felt that the dominant theme of the magazine taken as a whole did not appeal to the prurient interest. As a consequence the court declared that since the publication was not obscene in any event, the fact that it was utterly devoid of redeeming social value was of no importance. Furthermore, the California court emphasized that its decision is compelled by recent United States Supreme Court decisions holding similar magazines not obscene e.g. *Central Magazine Sales Ltd. v. United States*, 88 S.Ct. 235 (1967).

The dissent strongly urged that not only did the publication lack redeeming social value, but also that there was a prurient emphasis on genitalia which rendered the magazines obscene.

Comment: This case is in accord with the general trend of decisions holding that nudity alone, without lewdness, is not obscene. See e.g. *People v. Biocic*, 224 N.E.2d 572 (Ill. App. 1967).

Search And Seizure Of Allegedly Obscene Materials Held Invalid—*United States v. Brown*, 274 F.Supp. 561 (S.D.N.Y., 1967). The defendant made a motion under Rule 41(e) of the Federal Rules of Criminal Procedure directing return of 419 cartons of magazines seized by the F.B.I. pursuant to a search warrant. These magazines, located on the defendant's business premises, were thought to be obscene and "fruits of the crime of transporting obscene material in interstate commerce". These materials, however, were never examined by the magistrate who issued the warrant. The district court granted the defendant's motion, holding that materials which may be protected by the First Amendment freedoms cannot

be seized until the defendant has been allowed a hearing before the magistrate.

Moreover, the court noted that of the 419 cartons seized, the contents of only three were examined before the issuance of the warrant. Further, even though the warrant ordered the seizure of only sixteen cartons, 419 were actually taken. Thus, not only was there a violation of the Fourth Amendment in the issuance of the warrant without a hearing, but also a violation of the terms of the warrant by the F.B.I. in seizing 403 cartons not mentioned in the warrant.

The court also determined that the defendant had standing to assert his rights under the Fourth Amendment since he was the "person aggrieved" by the search as stated in Rule 41(e). Such person must have "... a recognizable interest in the property seized or the premises searched". The court relied on the recent decision of *United States v. Mancusi*, 379 F.2d 897 (2d Cir. 1967), which ruled that a vice president of a union has standing to object to an unreasonable search of the union's accounts since he was the "... one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence garnered as a consequence of a search and seizure directed at someone else". Thus, the *Mancusi* rule meant that the defendant, the sole owner of the corporation against whom the search was conducted, did have standing to object.

Seventh Circuit Adopts ALI Insanity Test—*United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967). The defendant claimed the defense of insanity. The district court defined the defense of insanity as follows:

'Insane' as used here means such a perverted and deranged condition of a person's mental and moral faculties as to render him either

(1) incapable of distinguishing between right and wrong, or incapable of knowing the nature of his act he is committing; or

(2) where he is conscious of the nature of the act he is committing and able to distinguish between right and wrong and knows that the act is wrong, yet his will, by which I mean the governing power of his mind has been so completely destroyed that his actions are not subject to it, but are beyond his control.

In rejecting this definition, the appellate court reasoned that the function of a definition of the

defense of insanity is to aid the jury in deciding whether an accused who is mentally ill was at the time of engaging in the offensive conduct, dominated or affected by his mental illness to so substantial a degree that society cannot in good conscience hold him responsible for the conduct as a crime.

The court adopted the following revised American Law Institute definition:

The defendant has interposed insanity as a defense. The law presumes that a defendant is sane. This presumption is rebuttable. Where a defendant introduces some evidence that he had a mental disease or defect at the time of the commission of the crime charged, the prosecution must establish beyond a reasonable doubt that the defendant did not have a mental disease, or defect, or that despite the mental disease or defect he had [the] *substantial capacity both to appreciate the wrongfulness* [either to know the criminality] of his conduct, and [or] to conform his conduct to the requirements of law. (Additions are italicized; deletions are in brackets.)

The test differs from the previous test which required complete destruction of power of self-control, whereas this test requires only that the defendant have less than "substantial capacity" to conform his conduct. The court found this ALI test better than the *Durham* test, which the court felt failed to serve its function when the instruction must include the proposition that the burden is on the government to prove beyond a reasonable doubt that the defense of insanity has not been established.

The dissent argued that while the courts may have difficulty in deciding whether the *Durham*, *M'Naghten*, or ALI definition of insanity should be given, a jury in any given case would reach the same conclusion, irrespective of which test was given.

Failure Of Court To Order Psychiatric Examination On Own Motion Not Reversible Error—*People v. Morales*, 61 Cal. Rptr. 764 (Ct. App., 1967). Defendant was found guilty of kidnapping, violations of the California Penal Code sections proscribing perversion and lewd and lascivious acts upon the body of a child under 14, and a prior felony conviction. The judgment was here affirmed upon appeal.

The facts of this case were disputed. The 13-year-old complaining witness testified that defendant's companion forcibly took her into a house where defendant committed lewd and lascivious acts upon her body. Another person allegedly present at this occurrence testified however that he had seen the complaining witness getting out of a car full of young men during the time she testified to being in the house. He further testified that she told him not to say anything to her father. A third witness testified that he and the defendant had been in a bar and then went to his house where the defendant spent the night. Defendant's testimony agreed with this. Thus, the jury was confronted with conflicting testimony as to the defendant's whereabouts at the time of the alleged criminal acts. It was further disclosed that the young girl had a prior history as a juvenile sex offender and that she was somewhat retarded, being unable to tell time and the name of the street on which she lived. On the basis of this evidence, the jury found the defendant guilty of the criminal acts charged.

The appellate court held that despite the fact that the prosecutrix's testimony was largely uncorroborated, the decision to order her to submit to a psychiatric examination was one entirely within the discretion of the trial judge. The mere fact that she is to some degree delinquent and dull witted will not be sufficient to cause an appellate court to overrule the trial judge's discretion. Her testimony need not be corroborated and was not inherently improbable so as to make the verdict erroneous as a matter of law. Nor was defendant's counsel incompetent not to subpoena the medical records of an examination given the prosecutrix after the incident because defendant need not have committed intercourse to have been guilty of the alleged crime. Therefore, the medical examination could not have established defendant's innocence. Defendant's conviction was therefore affirmed.

Comment: Certain rules have been established to facilitate proof of sex crimes which might otherwise go unpunished. But these same rules may lead to convictions based on evidence which is quite flimsy. Greater restraint on trial courts than is shown in this case may be necessary.

Four State Vagrancy Laws Struck Down—*Alegata v. Commonwealth*, 231 N.E.2d 201 (Mass. 1967). The petitions for writs of error brought by five defendants separately convicted of five offenses were heard and decided together. All had been convicted of misdemeanors intended to snare

vagrants and others who might be preparing to commit a crime.

Defendant Mitchell was fined for violating a statute permitting policemen to examine all persons abroad (at night) whom they have reason to suspect of unlawful design and may demand of them their business and where they are going. Persons who fail to give a satisfactory account of themselves may be arrested by the police and taken before a district court to be examined and prosecuted. The state argued that this statute does not constitute a substantive offense but only gives the police the power to stop, detain and arrest persons under certain limited circumstances. The court rejected this view, saying that the statute did attempt to create a substantive offense. Rather, it accepted the defendant's argument that the statute was unconstitutionally vague, violating both the Massachusetts Constitution and the Fourteenth Amendment due process clause. The court said that arrest for suspicion is too subjective to provide an intelligible standard to guide either the suspect or the court. Moreover, the test of failure to give a satisfactory account of oneself merely enhances the uncertainty since it gives too much discretion to the police and courts.

The court, however, explicitly did not overrule a previous decision, *Commonwealth v. Lehan*, 196 N.E.2d 840 (Mass. 1964), that upheld this statute in so far as it permits a brief threshold inquiry where suspicious conduct gives the officer reason to suspect that the person has committed, is committing, or is about to commit a crime.

Albert Patch was convicted under a complaint charging him, among other things, "as being an idle person with no visible means of support who has lived without lawful employment". The court held that the above section of the vagrancy statute seeks to punish a person because of his status. The court found that the statute was used against two types of persons, 1) alcoholic derelicts whose only crime is idleness and poverty, which should not be treated as a criminal offense, and 2) persons who are suspected of criminal conduct. As to these the court says this statute may not be used to shortcut due process requirements. This section, therefore, was held repugnant to the Fourteenth Amendment in that it seeks to make criminal, conduct which can not be classed as such and is an invalid exercise of the police power. The court also held that the section was void for vagueness.

Riley Fido was convicted under a similar statute that made it a crime to, "rove about from place to

place living without visible means of support". The court found this provision unconstitutional on the same grounds as are set forth in the Patch case.

Joseph Alegata, a convicted thief, was convicted under a complaint which charged that on a certain day he, "was a person known to be a thief and a burglar and was then and there acting in a suspicious manner around a store". He received a nine months sentence. This complaint was based on a statute making it a misdemeanor for a pickpocket, thief or burglar to act suspiciously in places that are, according to the court "so all inclusive as to embrace about any place where a person would apt to be present outside his own home". The court first held that it was an unconstitutional use of the police power to make commission of crimes in the past constitute a present offense. The qualifying phrase, "acting in a suspicious manner" is altogether too vague to turn noncriminal conduct into an offense.

In the last case the court held that the word "disorderly" was definite enough to withstand a charge of vagueness when it was interpreted as aimed against persons causing a public disturbance or hazard.

Referral Selling Plan Held To Be A Lottery—*M. Lippincott Mortgage Investment Co. v. Childress*, 204 So.2d 919 (Fla. Dist. Ct. App. 1967). In a suit on a promissory note the plaintiff, the assignee of the seller of a central vacuum cleaner system, appealed a summary judgment that as a matter of law the note of the defendant buyer was void because the transaction which formed its basis constituted a lottery.

In affirming the court of appeals did not find it necessary to decide whether the practices in this case constituted a lottery as defined by the case law. Rather, it based its decision on a Florida statute that makes all chain letters and pyramid clubs, where fees or anything of value is exchanged, lotteries. Any participant in such clubs or anyone who solicits persons for membership in them is guilty of a felony.

In the present case the undisputed facts were that after original contact by a friend who asked them if they were interested in making some money, the defendants were approached by Universal Marketing Research, the assignor of the plaintiff. The representatives of the seller presented the defendants with a plan whereby they could buy the central vacuum cleaning system for \$975.00 and give a promissory note for all but a

small downpayment. The defendants would also provide the seller with 16 names of friends who might be interested in likewise purchasing the cleaner. For each person of the 16 who bought the vacuum cleaner, the defendants would receive \$50. Defendants would be treated as agents of the seller and it was implied that their commissions would be enough to pay for their vacuum cleaner system and also make a profit that theoretically would exceed \$7000. The defendants accepted and altogether earned \$200 in commissions.

In deciding that this scheme fell within the statute and thus was a lottery the court looked to the motivating factors inducing appellees to deal with Universal. The court found that the evidence showed Universal's sales and promotional techniques were aimed at creating a desire to be paid large sums of money for no effort and not at creating a desire for the product. Apparently this, as well as the chain letter nature of the promotion, was considered in deciding whether the statute had been violated.

Gault Given Only Prospective Effect—Cradle v. Peyton, 156 S.E.2d 874 (Va., 1967). In 1962, petitioner, age seventeen, was brought before the juvenile court of Norfolk on charges of armed robbery. He did not appear with counsel nor was he advised of his constitutional right to have court-appointed counsel if he could not afford one, a right extended to juveniles in *Application of Gault*, 387 U.S. 1 (1967). The juvenile court waived jurisdiction and certified petitioner to the general city court for trial as an adult on both offenses. Petitioner was subsequently convicted and sought a writ of habeas corpus on the grounds that he was denied his constitutional right to counsel at the juvenile court hearing. The Corporation Court of the City of Norfolk denied the petition and on appeal this decision was affirmed.

The major issue before the Supreme Court of Appeals of Virginia was whether the rights afforded juveniles in *Kent v. United States*, 383 U.S. 541 (1966), and *Gault* applied to certification hearings which occurred prior to these decisions. Justice Gordon, writing for a majority of the court, based his decision on two grounds. First, a certification order differs significantly from a confinement order. The Virginia juvenile court made no finding of petitioner's innocence or guilt, only a finding that he should stand trial on the merits in another court. *Kent* dealt with a certification order but the Court limited its decision to a statutory, rather than con-

stitutional, basis. Second, after an examination of this case in the light of the policy criteria used to determine retroactivity in *Stovall v. Denno*, 388 U.S. 293 (1967), the court concluded that *Gault* should be given only prospective effect. Justice Gordon decided that the purpose of the new rules had been met in this instance and the disruptive effect of retroactive application would be great. Thus, certain irregularities in admitting the confession and in giving notice and the right to counsel were not reversible error here, even though they would be under *Gault*. Nor did the Virginia Constitution or statutes support petitioner's position. Relief was therefore denied.

Chief Justice Eggleston dissented on the ground that petitioner had been denied his statutory and constitutional right to have appointed counsel at the juvenile court hearing. He stated that the certification hearing was a "critically important" proceeding, within the scope of *Kent*, 383 U.S. at 560, which "may result in commitment", within the meaning of *Gault*, 387 U.S. at 41.

Two judges who concurred in the decision disagreed with the majority opinion on the ground that there was no valid distinction under *Gault* between certification and commitment proceedings but that such a distinction might be taken into consideration in determining whether *Gault* should be given retroactive effect.

Comment: The Constitution neither requires nor prohibits retroactivity as determined in *Linkletter v. Walker*, 381 U.S. 618 (1965). The right of a state to decide this in a post-conviction proceeding was recognized in *Johnson v. New Jersey*, 384 U.S. 719 (1966), and the criteria for states to use were provided in *Stovall*.

Because *Gault* did not state whether it was to be retroactive or not, the issue has confronted several courts. None have felt they could avoid the issue by relying solely on the distinction between a certification or waiver (of jurisdiction) proceeding and a commitment proceeding since the juvenile court could not know before the hearing whether it would retain jurisdiction or not. *State v. Acuna*, 428 P.2d 660 (N.M., 1967), and *State v. Hance*, 233 A.2d 329 (Md., 1967), have agreed with the Virginia court in *Cradle*. Arizona, on the other hand, even though critical of *Gault* has felt compelled to follow it in this situation in *Application of Billie*, 429 P.2d 699 (Ariz., 1967). The reasoning behind the Arizona court's decision is that unlike the cases construed in *Johnson*, *Gault* was a habeas corpus proceeding. These subsequent cases therefore come before the

courts in the same procedural context as *Gault* and cannot be distinguished from it. Thus, a habeas corpus decision must automatically have retroactive effect. Such a possibility was not considered in *Cradle*, *Acuna*, or *Hance*.

Procedures Which Prevent An Accused From Presenting His Witnesses Because Of His Poverty Are Unconstitutional—*Whittington v. Gaither*, 272 F.Supp. 507 (N.D. Tex. 1967). The petitioner, an indigent, was convicted of armed robbery. His motion for a new trial, appeal, motions for rehearing, and a petition for habeas corpus were all unsuccessful. He then brought a petition for a writ of habeas corpus in the district court alleging that the Texas post-conviction remedies were a denial of due process since they denied him an opportunity to present his defense.

The petitioner alleged that he knew of the existence of two witnesses who would testify that they had registered him at their motel on the night of the crime. Since Texas neither provided for release on personal recognizance nor paid for the expenses of out of state witnesses, there was no way that the indigent could prepare his defense and bring his witnesses to the trial. The court ruled that procedures that failed to give a defendant a complete opportunity to present his defense violated the Fourteenth Amendment due process clause. The court also held that since funds for presenting the defense were not available to the petitioner's attorney either from the petitioner or from the state, the petitioner was denied his Sixth Amendment right to counsel.

Abusive Remarks By Solicitor Forbidden—*State v. Miller*, 157 S.E.2d 335 (N.C. 1967). The defendants were convicted of breaking and entering. During the course of the trial, the solicitor made several remarks defiling the character of the defendants, made uncomplimentary comments concerning the defense counsel, and made arguments to the jury that certain witnesses were liars. The court reversed the convictions because of the grossly unfair and prejudicial arguments of the solicitor. The court held these remarks were calculated to mislead and prejudice the jury, because there was no supporting evidence in the record to justify his abusive remarks. Defendants in criminal prosecutions should be convicted upon evidence in the case, and not upon prejudice created by abuse administered by the solicitor.

The court said arguments to the jury should be

fair and based on evidence properly inferred from the record. The counsel should not indulge in vulgarities, and should refrain from abusive, vituperative, and approbrious language, which are only calculated to cause prejudice.

The court also held that it was error for the trial court not to forbid the grossly unfair and improper arguments of the solicitor. It is the duty of the judge to interfere when the remarks of counsel are not warranted by the evidence, and are calculated to mislead or prejudice the jury. The court felt to affirm the conviction would be a manifest injustice to the defendants' right to a fair and impartial trial.

Failure To Appeal Because Of Counsel's Mistake Not Waiver—*Robinson v. Myers*, 233 A.2d 220 (Pa. 1967). Robinson appealed from a denial of a habeas corpus petition on the grounds that his failure to perfect an appeal from a conviction of voluntary manslaughter resulted from an unconstitutional deprivation of counsel. The record indicated that counsel for the convicted were satisfied by the verdict, although the convicted still protested that his act was not a crime. Additionally, counsel actively discouraged the appellant from appealing. Their advice was based on an erroneous fear that he might be convicted on retrial of murder in the first degree, although in Pennsylvania conviction of a crime of a lower degree operated as an acquittal of more serious offenses.

The court ruled that when counsel indicated to appellant that he could exercise his right to appellate review only at the risk of placing his life in jeopardy again, it could not be said that the appellant intelligently waived his right to appeal.

Border Searches of Body Cavities—*Henderson v. United States*, —F.2d— (9th Cir. 1967). This case involves the validity of a border search of the appellant's vagina for narcotics. While crossing the Mexican border into California, the appellant was recognized and detained by one of the customs inspectors. He believed that she had been stopped on a prior occasion for smuggling marijuana and a small quantity of a dangerous drug. Upon searching her handbag the inspector found an automobile registration slip issued to a known narcotics peddler who had used women to bring his goods across the border. One of the female inspectors then conducted a strip search. The appellant resisted attempts to have her vagina inspected. Thereupon, she was compelled to submit to an examination by

a medical doctor, which resulted in the removal from her vagina of two rubber packets containing ninety-three grams of heroin.

The validity of border searches of body cavities was not questioned. The court stated that "[T]he only question we decide is whether initiation of the search was lawful." The government contended that mere suspicion of smuggling was enough to permit the search. The appellant, however, contended that the search was unreasonable and violated the Fourth Amendment.

It had previously been established by a long line of cases that border searches are unique and do not require probable cause. Mere suspicion of smuggling is enough to initiate a search. See *Rivas v. United States*, 368 F.2d 703, 709 n.3 (9th Cir. 1966). The distinction between ordinary searches and border searches is based upon the fact that the main purpose of the latter is not to apprehend persons but rather, to seize contraband property unlawfully imported into the United States. See *The Atlantic*, 68 F.2d 8 (2d Cir. 1933). Thus mere suspicion alone has been held to be sufficient to justify such a search for purposes of customs law enforcement. See *Cervantes v. United States*, 263 F.2d 800 803, n.5 (9th Cir. 1959).

The Ninth Circuit has recently applied a stricter test to border searches of body cavities in *Rivas v. California*, 368 F.2d 703 (9th Cir. 1966). That case involved a border search of the appellant's rectum for contraband. The appellant contended that "there must be a clear indication of the possession of narcotics" before a search at a border may be made. *Id.* at 710. This test was taken from *Schmerber v. United States*, 384 U.S. 757 (1966), which considered the constitutionality of blood tests in drunken driving cases. In that case the Supreme Court stated:

The interest in human dignity and privacy which the Fourteenth Amendment protects forbids any such intrusions [beyond the body's surface] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search. *Id.* at 770.

The court in *Rivas* agreed that the *Schmerber* test should be applied to border searches of body cavities. It stated:

[A]n honest "plain indication" that a search involving an intrusion beyond the body's surface cannot rest on the mere chance that desired evidence may be obtained. Thus we need not hold the search of any body cavity is justified merely because it is a border search, and nothing more. There must be facts creating a clear indication, or plain suggestion, of the smuggling. *Rivas v. United States*, 368 F.2d 703, 710 (9th Cir. 1966)

The court in *Rivas* did not consider the fact that *Schmerber* dealt with an intrusion beneath the body's surface rather than with the search of a body cavity. However, the court in the *Henderson* case resolved this distinction. It stated:

[W]e think that while the language quoted [from *Schmerber*] deals specifically with an invasion, rather than an intrusion on one's body, its implications are much broader. The decision emphasizes that the purpose of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusions of the state. To us this means that every search must be examined in the light of the amendment's requirement that it not be unreasonable and we think that this requirement applies to border searches.

Thus the court agreed with the appellant that even border searches must not be unreasonable. It did not attempt to change the mere suspicion test in the case of ordinary border searches. However, in the case of body cavity searches, the right of the state to keep out contraband had to be balanced with the right of dignity and privacy of individuals crossing the border. Thus, the court concluded that a "clear indication" test would serve to balance these interests and assure that border searches of body cavities would be reasonable.

The court found that the search in *Henderson* was not justified. It stated:

[R]ecollection based upon a prior event, based solely upon physical appearance, where the means of verification is readily at hand but not used, and where the incident recalled did not involve use of a body cavity did not constitute a clear indication of smuggling.

Thus, the Ninth Circuit in *Rivas* and *Henderson*

has applied a more rigid standard in the case of body cavity searches than has normally been used for ordinary border searches. The problem, however, arises in the application of this standard. The majority in *Henderson* concluded that there was not a clear indication of the crime, whereas the dissent argued that there was such indication. In *Rivas*, the court upheld the search stating that "[A] previously convicted and registered user of narcotics, coming across the border under the influence of narcotics as readily shown by his eyes, disclosing thirty recent needle marks . . . who acts in an extremely nervous manner may be searched, as one reasonably portraying a clear indication he may be smuggling contraband." *Rivas v. United States*, 368 F.2d 703, 710 (9th Cir. 1966). In the present case the appellant was believed to have smuggled previously, she carried in her purse the automobile registration slip of a known smuggler who used women to carry goods across the border, and she acted in a nervous manner, yet this was not deemed a clear indication of smuggling. Thus the clear indication test does not appear to be an objective standard which can be easily defined.

The court in *Rivas* stated that "while we know of no acceptable meaning of the term it can be readily defined." It noted that "indication is defined as 'an indicating; suggestion.' 'Clear' is defined as 'free from doubt, free from limitation, plain.'" However, these are subjective standards, for what is free from doubt varies from one person to another. *Henderson* does not define the term any further but merely accepts it as set forth in *Rivas*.

Schmerber suggests that the determination of what constitutes a clear indication should be left to a "neutral and detached magistrate instead of . . . an officer engaged in the often competitive enterprise of fetering out crime." *Schmerber v. United States*, 384 U.S. 757, 770 (1966). However, as noted in *Rivas*, this would be impractical in the case of border searches. The court stated:

[A]s in *Schmerber* (where the condition of drunkenness was fast fading away) some action had to be taken. Appellant could not be unnecessarily detained without arrest. He was committing no federal crime in being under the influence of narcotics. . . . With this in mind were the border officers required to let him pass, and thus allow the possible

entry of contraband into the United States? We think not. *Rivas v. United States*, 368 F.2d at 711.

The necessity of giving border guards discretion as to whether there is a clear indication of smuggling makes it even more important to define this term pragmatically. A court may review the guards' decision and reverse the conviction if it finds that the correct standard has not been used. However, the damage has already been done since the dignity and privacy of the appellant has been violated. Furthermore, court action in this manner may not deter additional unreasonable searches. The courts apply the exclusionary rule to illegally seized evidence in the hope that this will deter the police from further unreasonable searches. However, the border police are theoretically concerned with intercepting contraband and not with conviction of the smuggler. Even if a subsequent conviction is reversed, due to a lack of clear indication, the border police have already obtained possession of the contraband. Thus there exists the possibility of constant harassment of innocent travelers who are left without redress.

The court in *Henderson* confuses the matter even more by stating that failure to verify the guards belief that the appellant had smuggled in the past was one of the factors in the finding that there was no clear indication of smuggling. Assuming there was a readily available means of verification, this factor has nothing to do with the question whether or not the circumstances with which the guards were faced constituted sufficient grounds to initiate the search. Verification, of course, should be required since this will confirm any suspicion a guard may have and thus in the present case it is understandable that court considered the search unreasonable where there was no verification. However, this does not solve the general problem of formulating an objective standard which can be used in all situations whether or not verification is involved.

Apart from the problem of defining the clear indication standard, there exists the question whether or not this is the correct standard to apply. As noted above the rationale for not applying the probable cause test to border searches is that the main purpose of these searches is the seizure of contraband and not the apprehension of criminals. Smugglers, however, are subject to criminal prosecution and possible imprisonment,